SUPREME COURT, U. S.
JAN 1968
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1066

J. MACARTHUR WRIGHT,
Petitioner,
vs.
THE STATE OF NEVADA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of Nevada

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Petitioner J. MacArthur Wright, by and through his attorneys, Vargas, Bartlett & Dixon, prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of the State of Nevada.

A. OPINIONS BELOW

The Trial Judge sustained a Demurrer to the original Indictment in the above matter on the grounds

of misjoinder on November 15, 1966. This decision was not reported nor appealed and under date of November 29, 1966 the Grand Jury reindicted without taking further evidence although petitioner requested the right to appear and be heard.

The Trial Court issued an order discharging the petitioner on a Writ of Habeas Corpus on the grounds that the transcript of testimony before the Grand Jury was not sufficient to constitute probable cause for the finding of the Indictment. The State appealed from this order and the Nevada Supreme Court reversed this decision by Opinion filed September 25, 1967, and reported in 432 P.2d 87 (not yet reported in Nevada Official Reports, but referred to by Nevada State Supreme Court as Nos. 5363 and 5364), being Appendix A attached hereto.

A Petition to Enlarge the Record so as to permit petitioner herein, as respondent before the State Supreme Court, to enlarge the record and thereby present other questions to the Supreme Court was denied by the Nevada State Supreme Court on July 12, 1967. A Motion for Rehearing and to Correct Misstatement of Fact was denied October 13, 1967. (See Nevada State Supreme Court Record.)

Subsequently petitioner filed another Petition for Writ of Habeas Corpus under date of October 23, 1967, setting forth grounds which petitioner felt had not been passed upon in the Opinion of the Supreme Court above mentioned. Thereafter the State obtained an order granting a Permanent Writ of Prohibition against the District Judge who had issued the Writ

of Habeas Corpus and was going to hold a hearing thereon, said Permanent Writ of Prohibition being included herein as Appendix B.

B. JURISDICTION

i. The last judgment of the Nevada State Supreme Court was entered and filed November 8, 1967, as appears from Appendix B. All other decisions, both before the Trial Court and the State Supreme Court, were prior to this date.

ii. There was no order regarding a rehearing nor any order granting an extension of time within which to petition for certiorari.

iii. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257 (3).

C. QUESTIONS PRESENTED

1. Do the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States require that a presentation to a Grand Jury be made by an unbiased prosecutor and in a fair manner?

2. May a State Supreme Court, by use of a Writ of Prohibition, effectively suspend the use of the Writ of Habeas Corpus?

3. Was the evidence presented before the Grand Jury sufficient to justify the finding of an Indictment?

4. Is Section 172.270 Nevada Revised Statutes (hereinafter referred to as N.R.S.), which gives the Grand Jury the power to refuse to hear evidence for the defendant, violative of the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States of America as being a denial of due process or denial of equal protection under law?

5. Has petitioner been denied his right to a speedy trial as provided by the Sixth Amendment of the Constitution of the United States?

6. Was petitioner reindicted in violation of N.R.S. 174.280 and thus deprived of constitutional due process?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment XIV, Constitution of the United States, provides in part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 9, Constitution of the United States, provides in part as follows:

> *"Limitations on powers of Congress. . . .*
>
> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. . . ."

Article 1, Section 5, Constitution of the State of Nevada:

"*Suspension of habeas corpus.* The privilege of the writ of Habeas Corpus, shall not be suspended unless when in cases of rebellion or invasion the public safety may require its suspension."

Nevada Revised Statutes, Section 172.260 provides in part as follows:

"*Evidence Receivable before grand jury.*

2. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence."

Nevada Revised Statutes, Section 172.270:

"*Grand jury not bound to hear evidence for defendant, but may order production of explanatory evidence; issuance of process for witnesses.* The grand jury is not bound to hear evidence for the defendant. It is their duty however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they must order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses."

Nevada Revised Statutes, Section 172.280:

"*Degree of evidence to warrant indictment.* The grand jury ought to find an indictment when all the evidence before them, taken together, is such as, in their judgment, would, if unexplained and uncontradicted, warrant a conviction by the trial jury."

Nevada Revised Statutes, Section 178.495:

> *"Defendant dismissed if not tried within 60 days after finding of indictment, filing of information.* If a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the finding of the indictment or filing of the information, the court shall order the indictment or information to be dismissed, unless good cause to the contrary is shown."

E. STATEMENT OF FACTS

Question 1: The principal prosecutor, Daniel R. Walsh, had represented the State in a previous civil proceeding involving this defendant and the witnesses who appeared and testified against the defendant before the Grand Jury in a receivership action which was dismissed and later renewed by the State.

On this question the record shows in the transcript before the Grand Jury (see District Court Records) that the prosecutors presented a myriad of hearsay evidence favorable to the prosecution and permitted voluntary statements and prejudicial testimony to be presented. When a witness favorable to the defendant wished to make a hearsay statement he was admonished to refrain from doing so. (Vol. II, Grand Jury Transcript, pp. 330-331.) The other matters of prejudice on the part of the prosecutors are as set forth in Appendix C hereto.

Question 2: Petitioner filed the Petition for Writ of Habeas Corpus (Appendix C) before the Second Judicial District Court of the State of Nevada, in and for the County of Washoe on October 23, 1967. On Monday, November 6, 1967, petitioner received a telegram which is marked "Appendix D" and annexed to this petition. When counsel appeared pursuant to the telegram he was served with a Petition for Alternative Writ of Prohibition, and after an informal, unreported, in-Chambers hearing on the matter the Supreme Court of the State of Nevada issued a Permanent Writ of Prohibition found in Appendix B.

Question 3: In this connection, the Supreme Court improperly reversed the trial judge, and to demonstrate the lack of understanding in its Opinion the Supreme Court stated:

> "The record also shows payments totalling $15,000 to Wright as counsel fees, and almost $43,000 in 'travel expense', each without approval of the Board."

As a reading of the transcript before the Grand Jury will reveal this statement is not correct, and as indicated in the Supreme Court record no consideration was given by the Supreme Court to the request of petitioner to correct this misstatement of fact, even though considerable publicity was given to the statement by the Nevada newspapers. It is curious that this particular contention was never made by the prosecution in any argument preceding the Nevada Supreme Court Opinion.

With reference to the other statements in the Supreme Court Opinion to justify a finding that this petitioner might be guilty of embezzlement, the basic error of the Court is that they seemed to think that failure to get the approval of a Board of Directors to pay counsel fees could constitute embezzlement.

Question 4: Under this question the only significant point is that in this case the defendant did request, both by telegram and by letter, the right to appear before the Grand Jury and be heard and this was denied him. (See Appendix E and Exhibits A and B attached to Appendix C.)

Question 5: Although N.R.S. 178.495 provides for a trial within sixty (60) days of the finding of the Indictment, the time elapsed from the date of the second Indictment of November 29, 1966 and the time that the Trial Court decided the matter on May 19, 1967, was 171 days. The Trial Court held the matter under submission from the date of the hearing on January 19, 1967 to May 19, 1967, during which time briefs were filed, for a total of 120 days from the date of concluding argument to the time of decision.

Question 6: As appears from the original record of the District Court in the decision of Judge John W. Barrett under date of November 15, 1966, while he did direct the case to be submitted to another or the same Grand Jury as provided by statute, he further gave the right to the Attorney General to decide how, when and why he would proceed.

F. MANNER AND TIME OF RAISING FEDERAL QUESTIONS BEFORE STATE COURT

Question 1: In petitioner's judgment the first time the question was properly presented to the state trial or appellate court was by the Petition for Writ of Habeas Corpus filed October 23, 1967, Appendix C herein. This matter was never heard because it was precluded from being heard by the Supreme Court's Permanent Writ of Prohibition, Appendix B.

Question 2: This question is raised before the United States Supreme Court for the first time because, by its action, the Nevada State Supreme Court created this question for the first time. The date of this Writ was November 8, 1967, Appendix B.

Question 3: This question was first determined favorably to petitioner by the Trial Court on May 18, 1967. This determination was reversed by the Supreme Court of Nevada on September 25, 1967, Appendix A. For the reason that petitioner wanted to exhaust all possible remedies before the state courts before seeking relief from the Federal courts and to raise all possible questions before the state courts, petitioner filed a new Petition for Writ of Habeas Corpus in the state court, Appendix C, raising the other questions, with the exception of Question 2, which are presented in this petition. It is petitioner's position that the time for the consideration of all points here should commence to run from the date of the issuance of the Writ of Prohibition.

Question 4: The first time this question was formally presented to any Nevada court was by Ap-

pendix C, and the same has not been ruled on except by the Writ of Prohibition, Appendix B.

Question 5: This question was properly raised for the first time in Appendix C.

Question 6: This question was properly raised for the first time in Appendix C.

Explanatory Comment: In petitioner's Reply Brief to the State Supreme Court wherein petitioner was respondent and the State was appellant and the State insisted that the only question was the sufficiency of the evidence, nevertheless on pages 1 and 2 petitioner sought to raise all of the constitutional questions herein involved, except interference with the use of the Writ of Habeas Corpus by the Supreme Court. It is petitioner's position in seeking this Writ of Certiorari that these questions were properly raised for the first time before the State courts in Appendix C and that Appendix B has effectively prohibited a determination of this point by the State court.

In support of this position petitioner filed a Motion to Enlarge the Record on Appeal on July 7, 1967, so as to give proper consideration to these points, which Motion was denied July 12, 1967. (See Record on Appeal, Nevada State Supreme Court.)

In appellant's opening brief to the Supreme Court, as "Statement of Issues", it was stated:

> "Whether there is sufficient competent evidence presented to the grand jury in order to show probable cause to hold defendants for trial." (Appellant's Opening Brief, Supreme Court Nos. 5363 and 5364, p. 1.)

In appellant's reply brief it asked the Court to limit oral argument to the issue of probable cause although this brief does contain some discussion as to the other points sought to be raised by J. MacArthur Wright's answering brief. In reference to Count I in that brief the State had the following to say:

> "V. Bias Presentation.
>
> Argument of respondent in this regard on page 14 lacks citation of authorities in support. We don't believe there are any. We don't feel that the record reflects a biased presentation, even if the point had some merit. We reject, without further comment, the contention that we concealed facts. Directors on the opposite side of the fence in a corporate fight such as this are no more disqualified from testifying than a bank teller on the opposite side of the counter from a thief and on the wrong end of a gun." (Appellant's Reply Brief, p. 27.)

By its order refusing the right to have the record enlarged, the Supreme Court in its Opinion (Appendix A) precluded a proper consideration of these constitutional points on this appeal.

When petitioner sought a hearing on these same points before the District Court, the Supreme Court effectively precluded any such consideration by its Writ of Prohibition.

Apparently it is the position of the Supreme Court of Nevada, and counsel for the State of Nevada, that the phrase found in the last paragraph of the Opinion (Appendix A), to wit,

> "Other contentions respecting the two indictments have been considered and are without substance.",

was in fact a final pronouncement of Nevada's only court of appeal on the important constitutional question which had been sought to be raised. A complete answer to this position would seem to be found in the first sentence of the Opinion (Appendix A), to wit,

> "The issue presented by this consolidated appeal is the legal sufficiency of the evidence upon which a grand jury acted in returning two indictments charging embezzlement.".

Neither petitioner nor his counsel were served with a copy of the Petition for Writ of Prohibition until the morning of November 8, 1967, and the Petition was for an Alternative Writ and yet the same day the Supreme Court peremptorily issued its Permanent Writ of Prohibition. This in itself might be questionable due process.

The case is currently set for trial in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, commencing July 1, 1968, although here again the State has filed a Motion for an Early Trial and for Assignment of Judge, and this motion is pending before the Supreme Court at the present time.

G. BASIS FOR FEDERAL JURISDICTION

Not applicable to this case.

H. REASONS FOR GRANTING THE WRIT

Preliminary Comment: Anticipating that the contention might be made that the Permanent Writ of Prohibition pertains only to matters preliminary to the trial of the defendant, J. MacArthur Wright, petitioner urges the above entitled Court to rule upon the questions presented herein now so as to avoid the publicity, expense and time of a trial, the length of which has been estimated at six (6) weeks. The prosecution should be forced to be fair at all stages, including the accusatory stage, and to refuse to hear this petitioner now for the reason that his case has not been tried and that he might well be acquitted is not fair due process justice so far as this petitioner is concerned. Basically what petitioner is seeking is a rule of law that will require proper conduct at all stages of a criminal proceeding, including an accusatory proceeding. To deny this petition will put the stamp of approval on two systems of criminal justice in the State of Nevada:

First, for those accused by complaint, having the benefit of a preliminary examination, confrontation of accusers, presentation of evidence and cross-examination of witnesses as compared to,

Second, one where a prosecutor can get a Grand Jury to indict on evidence presented in a one-sided manner and from which hearing the defendant is effectively excluded.

1. As to the question of whether the presentation before a Grand Jury should be made by an unbiased prosecutor, although no cases were found squarely in

point on this question, it would seem that this must be so because it would not occur to fair-minded men that the rule should be otherwise. Many questions have been raised where special prosecutors or unqualified prosecutors were presenting cases to Grand Juries. (See Wharton's Criminal Law and Procedure, Vol. 4, Sec. 1716, pp. 478-486 inclusive.)

As appears from Appendix C and Appendix E the prosecutors both had at least apparent motives for being unfair, and a reading of the transcript demonstrates that they were in fact unfair.

The case of *James V. Giles v. State of Maryland,* 386 U.S. 66, 17 L. ed. 2d 737, 87 S. Ct. 793, although involving a conviction of rape after a trial was had, might shed some light on the concept petitioner is advancing in this petition. Although the Court did not agree on an Opinion in the *Giles* case (supra), the questions involved were similar to the one involved here, namely, was there a denial of due process by an unfair prosecutor. In the *Giles* case apparently the prosecutor suppressed evidence concerning the credibility of witnesses on the issue of consent. There was some claim that there was known use of perjured testimony by the prosecutor and applying the philosophy of this case to the instant case, it is submitted that the verified Petition for Habeas Corpus must, for purposes of issuing the Writ of Certiorari, be taken as true in the absence of any counter verified statements, and it is clear from a reading of Appendix C that a fair presentation at the Grand Jury level was not had.

It is submitted that due process requires a fairer presentation before a Grand Jury, since only one side is there represented, than would the presentation by a prosecutor at a trial of a case. An Indictment issued by a small-town Grand Jury with the attendant publicity and with a lawyer involved as a defendant means that whatever benefits may still exist in the presumption of innocence would be lost, and this fact, too, would require that extra care be given to see that a fair presentation is had before a Grand Jury which, in reality, is the last vestige of the Star-Chamber proceeding.

2. The net result of the rulings of the Nevada State Supreme Court, so far as the petitioner is concerned, is that he has not had a hearing before any Court on the constitutional issues for the reason that the same were not properly before the Supreme Court in the first instance, and when it was sought to bring them before the Trial Court by the use of the habeas corpus writ (Appendix C) the Supreme Court of Nevada precluded the use of this procedure. Although not a technical suspension of the Writ of Habeas Corpus in the sense that it was suspended for all citizens in Nevada, it was, so far as this petitioner is concerned, an effective suspension of the use of the Writ before any of the state trial courts and certainly of the State Supreme Court.

3. On the issue of sufficiency of the evidence, the Nevada court erred in not following the Nevada statutes as to the degree of proof. It is submitted that the Nevada statutes, N.R.S. 172.260(2) and 172.280,

when read together, require that there be legal evidence which is sufficient to meet the test of proof beyond a reasonable doubt where the evidence would stand unexplained and uncontradicted. There is no such evidence in the transcript of the hearing before the Grand Jury and it simply shows as to this petitioner that he acted as an attorney and as an officer of a corporation, but it shows absolutely no criminal activity of any sort on his part which would justify the finding of the Indictment.

4. With reference to N.R.S. 172.270 this statute confers upon a layman the right to withhold or grant a fair hearing. In this case, as will appear from the record, this petitioner sought to be heard before the Grand Jury on two occasions and was denied this right, as further appears from Appendix C attached hereto and Exhibits A and B attached thereto, and as appears from Appendix E.

A person proceeded against by complaint, preliminary examination and filing of an Information has a right to present evidence, to confront his accusers and to cross-examine the witnesses, all of these being elements of fair-play due process. To permit a statute to confer upon a layman to right to deny due process certainly must be violative of the Fourteenth, Fifth and Sixth Amendments of the United States Constitution. It presents an opportunity for two systems of criminal justice to exist in this country—one by secret indictment and the other by open public accusation. If we are to have equal justice under the law you cannot permit these two completely different

systems of criminal justice to exist with the discretion as to which system will be applied left to some appointed or elected public official or to a Grand Jury composed of laymen.

5. Under Nevada law the defendant was entitled to be tried within the sixty-day period, and the mere fact that he sought appropriate remedies to see that his case was fairly presented at the pre-trial level does not in and of itself constitute his causing the delay. The trial judge held the first habeas corpus proceedings under submission for a total of 120 days from the date of concluding argument to the date of decision, and this alone has deprived this petitioner of his right to a speedy trial.

The case of *Peter H. Klopfer v. State of North Carolina,* 386 U.S. 213, 18 L. ed 2d 1, 87 S. Ct. 988, holds that the Fourteenth Amendment includes the Sixth Amendment's guarantee of an accused's right to a speedy trial and, therefore, applies to the states. The delay in deciding this case at the Trial Court level is sufficient to have violated the petitioner's right to a speedy trial.

6. The contention that petitioner has once been placed in jeopardy in violation of the Fifth Amendment of the Constitution of the United States or should be released pursuant to Nevada statute, is based upon the concept that under N.R.S. 174.270 the trial judge should have directed the case, when he sustained the Demurrer in the first instance on the first Indictment, to be submitted to the same or another Grand Jury. As appears from Appendix C

under Third, Paragraphs II and III, the Court did not properly exercise this prerogative and instead apparently conferred the right of further proceedings upon the discretion of the Attorney General's Office of the State of Nevada. It is submitted that this was not a compliance with N.R.S. 174.270, and that under Section 174.280 the defendant should have been discharged. Perhaps constitutional double jeopardy per se is not involved, but certainly the concept of double jeopardy as reflected in the statute is involved and was violated.

CONCLUSION

It is believed that the question of whether or not a defendant, as a matter of constitutional due process, is entitled to a fair presentation before a Grand Jury is a question of first impression to this Honorable Court and is a question of tremendous importance and the Court should consider it. To refuse to do so leaves open a device whereby two systems of criminal justice can exist in the statutes and be enforced at the will of a prosecutor, be he honorable or dishonorable. It paves the way for a different treatment of our citizens in the field of criminal justice.

The other points involved are not unique but nevertheless are meritorious. A careful reading of the transcript before the Grand Jury and even of the contentions thus far made by the prosecution in this case fail to disclose any evidence to justify an Indictment on the charge of embezzlement and a reading of the entire record, considering the various points raised,

it is submitted will convince this Honorable Court that a grave injustice has been thus far perpetrated on the petitioner in this case.

Lastly, although the Grand Jury system has long been a portion of our law enforcement structure, its initial purpose was to protect the citizen against over-aggression on the part of government law enforcers. It is common knowledge that it no longer serves this purpose and has now been perverted to the position where it gives Star-Chamber criminal justice to those who are unfortunate enough to have this type of an accusation levied against them because a prosecutor desires to handle the matter in this way.

The Petition for Writ of Certiorari should be granted.

Dated, Reno, Nevada,
January 22, 1968.

Respectfully submitted,
VARGAS, BARTLETT & DIXON,
BRIAN L. HALL,
By BRIAN L. HALL,
Attorneys for Petitioner.

(Appendices A, B, C, D and E Follow)